Foreword

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The living law

This is the fourth edition of this popular work. I wrote the foreword to the first edition a decade ago. The remarks on that occasion reflected my then still recent experience as first chairman of the Australian Law Reform Commission (ALRC). Since then the book has changed, my experience has changed, and the law of Australia has certainly changed. It no lónger seems appropriate simply to adapt the words written in an earlier time, offering them up as a foreword to what is basically a new work.

As originally conceived, this book had its principal use in schools. Schools were one of my targets in the Law Reform Commission: to promote the teaching of legal institutions and basic legal rules in the schools of Australia. It is difficult now to recapture the vehemence of the opposition which this notion attracted in the late 1970s and early 1980s. The legal profession attacked it as a plan to produce a multitude of half-baked, bush lawyers. How many times I heard Alexander Pope's quotation hurled at me: "A little knowledge is a dangerous thing". The educational establishment also disliked the idea. In fairness, they were under pressure from many sources to add so many subjects to the school curriculum. They looked upon my efforts as yet another special interest advocating its own particular obsessions. Individual teachers were also fearful of the idea. Virtually none of them had been trained in the law. They were concerned at the lack of materials; and at their own doubtful competence to teach a highly complex discipline, even in its rudimentary outline. Some citizens opposed the notion, with those well-worn incantations to get back the "3Rs". Here was a push to add a fourth "R" — "Rules". The rules by which we live together in comparative peace and security, justice and lawfulness, in Australian society.

The efforts to promote the teaching of law in schools had, nonetheless, a number of valiant supporters. Amongst them were most of the judges and lawyers of Australia, who could perceive, even dimly, that it was scarcely just to presume that everyone knew the law, yet do precious little to instruct the citizenry in even the broad outlines of what that law was. A dedicated band of teachers in every State saw the potential interest and fascination of legal studies, and its utility to the future citizens of Australia, if it were well taught in schools. Adults, concerned about civic ignorance, began to lend their weight to the movement. Eventually, the educational bureaucracy succumbed.

One of the advantages of a Federation is that ideas can be tried in one State. When they are seen to succeed, they can be adopted elsewhere. This is what happened to Legal Studies in schools. It was tried in Victoria and then in New South Wales. Its enormous success in Victoria, and its great popularity with teachers and pupils alike, guaranteed its extension to the other States. Now it is one of the most popular and sought-after courses in the schools of our country. One by-product of this has been the increasing number of citizens of the future who are visiting the law courts, and watching the human dramas unfold every day, just as we, the judges, do.

I peer across from the bench at the young faces listening to the lawyers at their work, or to the witnesses giving their excited testimony. I wonder what they think about all this. About the judges in their wigs? The red robes for crime, and the black robes for civil cases? The ceremonies, the courtesies, the studied politeness? The fact that the opponent in a bitter contest is invariably described as "my learned friend". The way the obtuse judge is ever so gently corrected by "with the greatest of respect, your Honour". In my conversations with the pupils and their teachers, I am generally relieved to hear that the impressions are not all bad. If they think they see people striving to do justice, they see what normally goes on in an Australian courtroom.

But now this book is targeted to a somewhat different audience — at the colleges and universities, where legal studies and related courses are now increasingly taught. There the law is observed as a discipline not necessarily preparatory to legal practice, but as a social phenomenon of control and justice, worthy of study in its own right.

Necessarily, this change of focus has led to some alterations in the presentation of the book between the differing editions. Perhaps out of respect for a more mature audience, there are fewer illustrations, cartoons and photographs to soften the dense text. I am afraid that as you grow older, and especially as you climb the tree in the law, the barrage of data increases — there are not too many cartoons in the ordinary life of the lawyer, magistrate and judge. The publisher hopes that the book will continue to be used in schools. But now there is a wider audience, and perhaps one more critical of the law, its institutions and personnel.

Criticism is the name of the game today. Things long settled are suddenly coming unstuck. The appointment by governments of leading barristers as QCs has been terminated in a few jurisdictions of Australia, and is under question by the Trade Practices Commission everywhere else. Wigs and gowns, those perennial old favourites, come up for attack every time the media want a simple focus for criticism of the law and its doings. The costs of legal services and the effective unavailability of the law to many Australians, has prompted enquiries by innumerable committees. There has also been unprecedented criticism of the courts and of some judgments, even of the highest court, the High Court of Australia. Even the Royal Coat of Arms, which hangs behind the judges in the State Supreme Courts of Australia, is coming under question. The Crown, as "the font of justice", and the symbol of neutrality and service to all people, has been questioned by republicans.

So these, indeed, are changing times. They make it difficult to write a text on the law of Australia, which will last more than a couple of years. So much changes that publishers of books like this are kept on their toes. No wonder this is the fourth editon in less than a decade.

Reform of the law

I applaud the fact that, through the various editions, the authors have retained a questioning stance about the content of the law, and even about its fundamental institutions. This is not to say that the basic features of a law-abiding and constitutional society should be cast aside for momentary advantage. In 1992, Australia witnessed the effective dismissal of ten Victorian judges whose integrity and qualifications for judicial office were unquestioned. They were removed from office, because the government considered that it was in the public interest to abolish their tribunal (the Compensation Tribunal of Victoria). The Victorian Parliament obliged. The promise which the judges had received of security of tenure, necessary for judicial independence, and for judges to be able to do brave and strong things to powerful people, was set at nought. This was not reform. What happened to the Victorian judges illustrates the fragility of the conventions which protect the basic features of our law and constitution. Fortunately, Federal judges could not be treated in the same way because of the terms of the Australian Constitution. And that Constitution cannot be changed without the affirmative vote of the majority of the Australian people in the majority of States.

Such fundamentals aside, there is plenty of scope for improvement of the law, of the legal profession, and of the judiciary. In the passage of time between the first and fourth editions of this work, important reforms have been achieved. Many more remain for the future. Some of the most notable reforms have been secured by judicial decision, not by Parliament. That is itself a source of anxiety to those who are dedicated to the ideals of Parliamentary democracy.

In my law reform days, I saw our work on the reform of the law as addressed to Parliament. The object was to help Parliament improve Australia'a laws. Many of the areas where law reform is needed most are examined in this book. In some cases, the reforms proposed by the Law Reform Commission have been adopted, if not by legislation, then by judicial initiative. Take the following areas examined by the Australian Law Reform Commission mentioned in this book:

Aboriginal customary laws. The text makes mention of the view taken at the establishment of the settlements in Australia when the country was almost entirely without laws, that the laws of the Aboriginal people, if any, could be ignored (¶1046-¶1048). This rule offended some judges who are actually dealing with Aboriginal Australians. Attempts were therefore made to give recognition to the reality of Aboriginal customs under which, occasionally, Aboriginal Australians accused were liable to be punished twice, both by our law, and by their own communities (¶1047). Judges also developed rules to recognise the serious cultural disadvantages which some Aborigines, at least, faced in our courts. The ALRC reported on ways in which, 200 years after European settlement, a more comprehensive approach could be adopted to the recognition of Aboriginal customary laws in Australia. Most of the Commission's proposals have not yet been implemented. But in *Mabo v Queensland*, the High Court of Australia has exploded the myth that Australia was *terra nullius* before the European settlement. It has accepted that Aboriginal communities may have had established rules on the title to their land which survived the acquisition of Australia by the British Crown.

Sentencing. The discussion of Australia's criminal law contains mention for the options for the sentencing of persons convicted of criminal offences (¶809). The ALRC also conducted a major review of sentencing reforms. It led to some legislation dealing with Federal offenders. In some States of Australia, "Truth in Sentencing" legislation has been enacted. Quite radical reforms of sentencing law have been introduced. Even without legislation, judges have made arrangements for the provision to them, on sentencing, of comparable data to ensure that sentences avoid the "badge of unfairness" inherent in unequal treatment of like offences and offenders.

Evidence. The book also contains a useful discussion of the adversary trial system which Australia has inherited from England (¶114). The influence of the jury on the way in which trials are conducted is examined (¶703-¶715). The ALRC, in concert with State law reform bodies, has suggested major reforms of Australia's evidence laws, to simplify and unify the laws applied in the courts across this continent. Legislation on this subject is pending at the time this edition goes to press. But even without legislation, judges have adapted the law of evidence to meet the increased pressure upon the courts, to help them get through their business in an efficient, logical and rational way. In the decline of jury trials, many of the old battles about evidence have been replaced by attention to efficiency and economy of presentation of cases. In general, this represents a good development at a time when lawyers' fees have gone beyond the capacity of most ordinary citizens to pay.

Criminal investigation. One of the first projects of the ALRC concerned the reform of criminal investigation. Important proposals were put forward to reduce the risk of wrongful conviction by unfair procedures adopted by the police. One of these was "verballing", ie false confessions attributed to persons whilst in custody. The ALRC urged the adoption of sound and video recording of confessions to reduce the battles which consume so much time in the courts. Governments and police prevaricated. The legislation was not uniformly enacted. Accordingly, in 1992, the High Court of Australia in the important decision of *The Queen v McKinney* indicated that the courts would wait no longer. For the defence of the integrity of criminal trials, and to prevent wrongful convictions by false or dubious testimony, judges would henceforth be required to give warnings to juries about the dangers of convicting accused persons upon the basis of uncorroborated evidence, including police evidence, which was not recorded mechanically or otherwise confirmed. To this end the judges showed that Parliamentary neglect of reform would bring forth resolute action from the common law of Australia to provide assurances against the injustice of a wrongful conviction.

Fair trial. A special problem of Australian law derives from the multicultural nature of our society. About one in five Australians speak at home a language other than English. This feature of our community is necessarily reflected in our courtrooms (¶1041). However, it is not always reflected in the substantive law. Yet in 1992, in *Dietrich v The Queen*, the High Court of Australia made an important decision protective of the essential fairness of the criminal trial for all people accused. Reversing an earlier decision, it held that, at least in some circumstances, if an accused person is not legally represented at trial, and the trial for that reason is unfair, a conviction will be quashed. This decision has significance beyond legal

representation. The same element of unfairness can arise for a want of interpretation to permit a litigant to understand what is happening in the courtroom and to be understood by magistrate, judge and jury.

Class actions. In the discussion of civil procedure, mention is made of class actions (¶819). As goods and services are nowadays mass produced, it is inevitable that errors and faults can give rise to mass produced legal problems. It is essential that the legal system should adapt its procedures to deliver justice to multiple parties. Some legislation has been enacted as a result of the ALRC report in this regard. But much remains to be done. Court procedure, being largely in the hands of the judges themselves, could be done by the judiciary without the need for legislation.

A time of change

In my earlier attempts to introduce this work, I referred to the difficulty of securing constitutional change in Australia. This is a point noted in the record of the relatively few changes which have been adopted by the formal constitutional procedure of section 128 (¶231). Sometimes the intense conservatism of Australians on constitutional questions can be extremely frustrating to the reformer. On the other hand, it can also occasionally protect the good and liberal and tolerant features of our society. For example, in 1951, in the midst of the Cold War, and with Australian troops fighting the "Reds" in Korea, there was enormous pressure to ban the Communist Party, and to amend the Australian Constitution to permit this to be done. Fortunately, that proposal was rejected at a referendum. The Constitution remained a living protection for Communists, as for other minorities in our society. The way to beat opinions considered to be erroneous is not to ban them, but to meet them with rational argument and persuasion.

As Australia approaches the centenary of its Constitution of 1901, and a new millennium, there will be many calls for changes to this rather sparse document — the Constitution. Perhaps some changes will be accepted. The lesson in history is discouraging to the advocates of radical constitutional change. I imagine that the reason for that resistance is that, at least by comparison to most other countries, we are quietly and justly governed, at least for the most part. In saying this, I would not wish to finish upon a note of complacency. It is the privilege of a free people to submit all of their institutions, personnel and laws, to constant scrutiny and to the severest of criticism. From the top to the bottom, from the old to the new, we can and should be critical. We should throw out what is unjust, or anachronistic, or unsuitable. We should constantly be striving to improve our laws. All of us should feel a responsibility about the state of the law.

The value of this book is that it encourages a community which is knowledgeable about its laws and legal institutions. The beginning of informed appreciation and criticism is obviously a knowledge of what is there.

The law does not belong to judges, lawyers, politicians, or any other group. It belongs to the people. It is true that a people aware of the law will know its many weaknesses. I hope they also appreciate that, in Australia, there are also many great strengths.

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